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Nos. 87-821, 87-827 and 87-1095

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PITTSTON COAL GROUP, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

BRIEF AMICI CURIAE OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, THE AMERICAN INSURANCE ASSOCIATION, THE ALLIANCE OF AMERICAN INSURERS AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

Amici curiae,[1] the American Insurance Association, Alliance of American Insurers, National Association of Independent Insurers and the National Council on Compensation Insurance, respectfully request that the decision of the United States Court of Appeals for the Eighth Circuit entered on March 25, 1987, and

1. In accordance with Rule 36.1, the written consent of the Pittston Coal Group, *et al.*, the Solicitor General, James Sebben, *et al.*, and Charlie Broyles, *et al.*, are submitted herewith.

the decision of the United States Court of Appeals for the Fourth Circuit entered on July 31, 1987, be reversed by this Court.

INTEREST OF AMICI

The American Insurance Association ("AIA"), the Alliance of American Insurers ("Alliance") and the National Association of Independent Insurers ("NAII") are separate, independent, not-for-profit insurance industry trade associations. Their collective membership includes more than 850 insurance companies and their subsidiaries. Member companies write more than 85% of the premium dollar volume of workers' compensation insurance coverages sold in the United States. Members within each association directly provide coverage to coal mine operators for claim liabilities arising under the Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1982) (the "Act").

AIA, Alliance and NAII member companies also provide a wide variety of property-casualty and general liability lines of insurance to commercial enterprises throughout the United States. These amici represent the interests of their members in matters of special concern to the commercial liability insurance industry. Many AIA, Alliance and NAII members have a direct substantial economic stake in the outcome of this litigation. Perhaps, even more importantly, the circumstances that give rise to these appeals pose difficult and troubling questions that go to the very heart of the ability of the insurance industry to respond in the future to commercial insurance risks created by the Congress and federal agencies.

The National Council on Compensation Insurance ("NCCI") is the largest not-for-profit workers' compensation insurance service organization in the United States. Its membership includes more than 700 insurance companies and competitive state insurance funds that provide workers' compensation insurance coverage to employers throughout most of the United States. In thirty-five states, including most major coal mining states, NCCI collects data and develops premium rates and rating plans for workers' compensation insurance. NCCI also manages various

workers' compensation assigned risk plans and the National Workers' Compensation Reinsurance Pool (the "Pool"). Pool members reinsure among themselves several categories of risk that arise under the Act. In particular, the Pool is the only commercial vehicle available to small or high-risk mine operators that are unable to qualify to self-insure their federal black lung liabilities under U.S. Department of Labor regulations, 20 C.F.R. Part 726 (1987), or to purchase direct coverage from a state fund or insurance carrier. Most of NCCI's members and many AIA, Alliance and NAII members participate in the Pool and are individually liable to the Pool for losses or payouts on claims that exceed the ability of the Pool to make payments from insurance premiums collected. Historically, 15% to 20% of all federal claim liabilities are insured or reinsured by the Pool. Approximately 50% of federal black lung liabilities that may be allocated to an individual mine owner are commercially insured.[2] The companies and competitive state insurance funds represented by all amici account for more than 98% of the premium dollar volume of all U.S. workers' compensation coverages, including those available under the federal black lung program.

In black lung claims the insurer is a party to the litigation and, as such, participates directly on behalf of its insured. 20 C.F.R. § 725.360(a)(4); *Warner Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 804 F.2d 346 (6th Cir. 1986). In this capacity, the insurance carrier hires defense counsel and bears the cost of claim litigation and administration.

The commercial liability insurance industry has a direct, immediate and substantial interest in the outcome of this litigation.

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2. Liability arising out of claims in which the miner was last employed prior to January 1, 1970, and certain uninsured liabilities are paid by the Black Lung Disability Trust Fund. 30 U.S.C. § 934(a). The Trust Fund is financed by a producer tax on coal. 26 U.S.C. § 4121.

STATEMENT OF THE CASE

A. History

In 1969, Congress enacted the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, to improve safety conditions in U.S. coal mines and reduce the exposure of coal miners to hazardous dust produced in mining operations. In response to a generally correct perception that miners affected by coal-dust related disease ("pneumoconiosis" or "black lung" disease) had been unable to obtain benefits under state workers' compensation laws, the 1969 Act also included among its provisions a separate Title IV to establish a temporary[3] federally financed black lung remedy for miners and their families.

The program contemplated an open filing season for claims terminating on December 31, 1972, and the eventual correction of inadequacies in state workers' compensation laws. 83 Stat. 795. During the initial period, claims were to be filed with, adjudicated and paid by the Secretary of Health, Education and Welfare, employing the resources of the Social Security Administration ("SSA"). Benefits awarded were to be paid by the U.S. Treasury, and claims were to be decided under the eligibility rules and adjudication procedures of sections 205 and 223(d) of the Social Security Act, 42 U.S.C. §§ 405, 423(d), *incorporated by reference into* 30 U.S.C. §§ 902(f), 923(b). The SSA portion of the program was called "Part B." 30 U.S.C. §§ 921-925.

After the termination of Part B, it was anticipated that all new claims would be filed under applicable state workers' compensation laws. *Id.* § 931. In recognition of the possibility that all states might not have had an adequate state law in place by 1972, the original Act contemplated the extension of the federal program to 1976. It provided that a miner residing in a state not having an adequate workers' compensation law could file a claim with the Secretary of Labor under a new program called "Part C." Part C claims were to be filed with the Secretary of Labor and adjudicated under the adversarial litigation provisions of the

3. The original program was to expire in its entirety on December 30, 1976. 83 Stat. 796.

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-952, *incorporated by reference into* 30 U.S.C. § 932(a). Part C claims were to be funded by mine owners. Mine owners were directed either to self-insure this risk or purchase commercial insurance. 30 U.S.C. § 933.

The original black lung Act contained four eligibility rules: (1) total disability was to be determined on the basis of medical criteria not more restrictive than those applied under 42 U.S.C. § 423(d); (2) an occupational cause could be rebuttably presumed if a miner with ten or more years of exposure had pneumoconiosis; (3) death due to pneumoconiosis could be rebuttably presumed if the miner had ten years of exposure and died due to a respiratory disease; and (4) a mandatory inference required the payment of benefits to any miner suffering from the most advanced stage of black lung disease. 30 U.S.C. §§ 921(c), 923(b). These provisions applied to both Part B and Part C claims. 83 Stat. 797.

In 1972, Congress amended the law in several respects. Black Lung Benefits Act of 1972, 86 Stat. 150. The most significant thing that happened in the 1972 legislative process produced no statutory amendment. Rather, in a Senate Report, SSA was directed to write regulations containing "interim evidentiary rules and disability evaluation criteria" to ensure the prompt processing and payment of SSA claims. S. Rep. No. 743, 92d Cong., 2d Sess. 16, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322-23. Whatever the Senate Committee meant by this is not on the public record, but in hindsight it is apparent that several key members of Congress simply wanted SSA to pay most claims whatever their merits. *See* Nelson, *Black Lung: A Study of Disability Compensation Policy Formation* 92 (1985) (noting, "SSA officials working closely with the members of the Committee staff developed a strategy for implementing the amendments that would allow SSA to pay most of the claims. The essential element of that strategy was some seemingly innocuous language added to the committee report.").

In response, SSA published a rule popularly known as the "interim presumption." It could not be applied to Labor Department claims. 20 C.F.R. § 410.490 (1987). After a brief comment period, SSA began to apply the rule. The rule itself was designed without input from SSA's medical staff[4] and implemented without public input. Since it had no application to mine owners and reflected only the private arrangements between SSA and its congressional overseers, the implementation of the rule went largely unnoticed. To this day, there is no way of knowing how SSA applied its rule.[5] The language of section 410.490 is duplicative and ambiguous and all that is certain is that it produced awards. It is not surprising that in congressional hearings from 1973 to 1975 the Labor Department noted that the inapplicability of section 410.490 was a major reason why Labor was unable to approve as many claims as had SSA. *See Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources,* 95th Cong., 1st Sess. 49 (1977).

When in the late 1970s it was resolved again to amend the Act, the House of Representatives settled upon several amendments that would have changed the character of the Labor program to make it more like SSA's, and to facilitate results in claim determinations that approximated SSA's experience. The House had been told that SSA's presumption could not be constitutionally applied in litigated claims involving mine owners.[6] To overcome

4. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor,* 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, Social Security Administration).

5. *See* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues,* 83 W. Va. L. Rev. 869, 897 (1981) (observing "it must be understood that the SSA and Labor versions [of the interim presumption] . . . can be contrasted in the hypothetical only. An attempt at explaining how SSA applied the interim presumption . . . would be to engage in speculation, at best.")

6. *See* H.R. Rep. No. 770, 94th Cong., 2d Sess. (1975), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st. Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979).

this obstacle and to implement still further liberalizations of entitlement rules of questionable scientific merit, the House enacted a bill that would have eliminated mine owners' rights to contest claims yet retaining their obligation to finance benefits. This scheme would have created several new "irrebuttable" presumptions, would have left SSA with sole authority to write eligibility regulations, and would have required application of "criteria" no more restrictive than SSA's, as a last resort, in the consideration of Part C claims. H.R. 4544, 95th Cong., 1st Sess. §§ 2, 8, 9 (1977).

The Senate took a more moderate course that retained the essential characteristics of Part C as a workers' compensation program, eschewed the extravagant eligibility rules proposed by the House, and directed the Secretary of Labor to write medically sound eligibility rules. S. 1538, 95th Cong., 1st Sess. (1977). Although the final bill conformed for the most part to the Senate proposal, the compromise reached retained two key House provisions. All previously denied claimants were to have their claims reviewed either automatically (Part C claims) or at the claimant's option (Part B claims), and criteria no more restrictive than those applied before July 1, 1973, by SSA were to apply under Labor Department rules to all reviewed claims and a limited category of new claims. 30 U.S.C. §§ 902(f)(2), 945.

In keeping with this directive, Labor promulgated its version of the interim presumption. 20 C.F.R. § 727.203 (1987). Labor's rule differs from SSA's. Both rules establish a rebuttable presumption of eligibility for benefits under the Act. The Labor presumption is more easily invoked in most cases, except that a miner with less than ten years of coal mine employment and positive x-ray evidence is permitted to invoke SSA's rule but not Labor's. Labor's presumption is rebuttable but, according to the circuits, SSA's is not generally rebuttable. Section 410.490 is rebutted only if the miner "is either doing or capable of doing his usual coal mine work" whether or not the inability to work is

black-lung related. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *cert. granted*, 108 S. Ct. 1288 (1988). "Section 410.490 cannot be rebutted by medical evidence." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1185 (7th Cir. 1987). By contrast, the Labor Department's presumption may be rebutted by the defendant if the relevant medical proof establishes that the miner is not totally disabled by, or does not suffer from, or did not die due to black lung disease. 20 C.F.R. § 727.203(b); *see Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 432 (1987). Section 410.490, as it has been interpreted, provides benefits whether or not a miner's absence from the workplace is caused by black lung disease, and in some instances, whether or not the miner actually suffers from this occupational disease. *See Cook*, 816 F.2d at 1185; *compare* 20 C.F.R. § 410.490(c) *with id.* § 727.203(b).

These differences notwithstanding, Labor obtained pre-publication clearance for its rules from the leadership of the House Committee on Education and Labor that had so aggressively pursued an SSA-like entitlement scheme. *See* Letter from Representatives Perkins, Dent and Simon to Robert B. Dorsey, U.S. Department of Labor (May 25, 1978). The Labor rules were published for comment and promulgated without change in August 1978. 43 Fed. Reg. 36,825-26 (1978). From the beginning, section 727.203 was consistently applied by the Labor Department to require ten years of coal mine employment for its invocation and to permit the rebuttal of presumed facts.

The series of cases that resulted in these appeals questions whether Labor was authorized to write a rule that did not produce the same result as section 410.490. In *Broyles*, the Fourth Circuit held that Labor was not so authorized and the court directed the Secretary to apply section 410.490 in pending Labor Department claims.[7] 824 F.2d at 329. In *Coughlan* v. *Director, Office*

7. The Seventh Circuit disagreed with the Fourth Circuit's conclusion, finding the Labor rule valid. *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987); *Taylor* v. *Peabody Coal Co.*, 838 F.2d 227 (7th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3739 (U.S. April 15, 1988) (No. 87-1720). The Third Circuit finds the Labor rule invalid. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987). The Sixth Circuit agrees that the Labor ten-year rule is invalid, but permits rebuttal by the Labor formula. *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (6th Cir. 1987), *petitions for cert. filed*, 56 U.S.L.W. 3643, 3484 (U.S. Dec. 21, 1987) (Nos. 87-1045, 87-1065).

of Workers' Compensation Programs, 757 F.2d 966 (8th Cir. 1985), the Eighth Circuit had reached the same conclusion as the Fourth Circuit. Then, in *Sebben* v. *Brock*, the Eighth Circuit ordered the Secretary of Labor to reopen and readjudicate under the SSA rule all of the claims subject to an interim presumption that were previously denied by Labor.

Available data indicate that 155,000 claims are potentially affected by the decision in *Sebben*, of which 94,000 involve miners with fewer than ten years of coal mine employment.[8] Insurance industry actuaries estimate that the combined effect of *Sebben* and *Broyles* will add from three billion dollars to six billion dollars or more to the aggregate liability of the Black Lung Disability Trust Fund, employers and their insurance carriers.[9] The cost of readjudication would range from two hundred million to four hundred million dollars.

8. *See* Petition for a Writ of Certiorari filed by the Solicitor General in No. 87-827 at 11; *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 7, 102, 186 (1981) (prepared statements of Morton E. Henig, U.S. General Accounting Office, Sam Church, Jr., President, United Mine Workers of America, and Charles Coakley, AIA).

9. The rationale for this conclusion includes a number of variables. The non-rebuttability of section 410.490 is a major factor. The inability or unwillingness of the Department of Labor to vigorously defend claims is another. *See* Comptroller General of the United States, *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* (1982). There are many others as well, including the fact that each reopened claim would involve a new trial with new evidence and a much older miner. Since pulmonary capabilities diminish with age, many claimants would be able to establish the interim presumption simply by having grown older. *See supra* note 4 (testimony of Dr. Harold I. Passes).

B. Insurance Industry Involvement

Insurance carriers called upon to underwrite the federal black lung risk have always faced difficult challenges. The coal industry, unlike some other major industrial sectors of the economy, is composed of thousands of mostly small producers. Most of these companies would have no financial ability to pay or even defend a single claim, the cost of which averages from $118,315.88 for a claimant without dependents to $185,659.69 for a married miner. Costs can go much higher. *See* U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981).

Workers' compensation insurance, unlike most commercial lines, cannot limit the maximum liability of the carrier. If a carrier offers workers' compensation coverage, it must provide full coverage for the insured employer's statutory workers' compensation liability, come what may, in order for the employer to comply with mandatory insurance requirements imposed by state workers' compensation laws.[10] Under laws regulating the business of insurance, retroactive adjustment of workers' compensation premium rates to cover losses generated by the insurance carriers' miscalculations of the cost of a risk is impossible. The entire estimated cost of insuring a risk is fixed at the time a policy is sold and, when an occupational disease claim is filed, it attaches to the policy in effect at the time of the worker's last employment. *See* 20 C.F.R. § 726.203. Premiums collected for that policy must cover all claims attributable to that policy. Premiums charged for policies in future years are not and cannot be calculated to pay the cost of previously incurred claims.

For these reasons, workers' compensation insurance premium ratemaking has evolved into an exacting science. Predictability, certainty, and a careful evaluation of potential risks are critical features of this very complex process. Pooling arrangements,

10. State insurance officials regulate insurance premium rates and policy provisions. In workers' compensation lines of coverage, the carrier must provide full coverage for all insured employers. The Act contemplates the regulation of rates and coverages for the federal program by state agencies. 30 U.S.C. § 933(a).

like the National Workers' Compensation Reinsurance Pool, are essential to accommodate otherwise uninsurable employers. To avoid catastrophic unfunded losses, industry specialists devote great care to reach an understanding of the nature of the risk to be insured. Sometimes errors are made, and the carriers and pools are answerable when that occurs.[11] That is to be expected and is simply a reality of the insurance business.

What makes this case different, and the result that would flow from *Sebben* exceptionally inequitable, is that the workers' compensation insurance industry was not asked to, did not, and would not have insured the risk created by the SSA presumption. That risk has little or no relationship to total disability or death due to black lung disease. The SSA provision, by its plain language, compensates unemployment, disabilities whatever their cause, retirement and old age. The workers' compensation insurance industry wrote no policies, collected no premium and had no basis on which to ascertain that, in writing a workers' compensation insurance policy covering mine owners, it was insuring the life and health of all coal miners. If *Sebben* and *Broyles* are correct, this industry, the coal industry, the Department of Labor, energy and insurance consumers and probably most of the members of Congress itself have been the victims of an atrocious delusion.

SUMMARY OF ARGUMENT

The decisions of the Fourth and Eighth Circuits operate in concert to redesign the fundamental concept of the Department of Labor's black lung program. Together they require the insurance industry, and to a much larger degree, the coal industry, to fund benefits to coal miners that are in no way justified. The benefits are called "black lung" benefits, but even a cursory review of the two regulations at issue, the SSA rule and the Labor rule, reveals that the latter may involve compensation for black lung disease, but the SSA rule does not.

11. If errors are made in favor of the industry, future rate calculations must reflect an appropriate adjustment.

We believe that Congress intended this important difference between the two programs. But the words used to convey this intent in the statute and its legislative history lack precision. The legislative context is ambiguous, perhaps by design. In attempting to structure a black lung workers' compensation program in keeping with Congress's intent, the Department of Labor developed an eligibility regulation in section 727.203 that is likely to be the most plaintiff-favorable-burden-of-proof-shifting vehicle ever designed by a federal agency for adversary litigation. But in doing so, Labor opted to maintain some scientific validity in its standard and permitted claim defendants the opportunity to prevail in a non-meritorious claim. The Secretary of Labor's perception of the agency's mission is entitled to deference, and the agency's rule should be sustained. Section 410.490 is a private rule with a hidden purpose and has no place in the Part C black lung program. Under the SSA rule, proven facts do not produce a factually true inference of a claimant's right to benefits, and presumed facts are essentially irrebuttable. Section 410.490 violates the Due Process Clause of the Fifth Amendment to the United States Constitution for this reason.

The Eighth Circuit's decision mandating the relitigation of tens of thousands of closed cases is not authorized by any source of law. The Longshore Act precludes the exercise of jurisdiction over claims outside of prescribed statutory procedures. Longshore procedures are preemptive and the pursuit of the remedies they provide is mandated for any party seeking relief from a black lung claim determination. The procedures reflect the principle of res judicata, and res judicata applies to completed adjudications in black lung claims, including those claims in the *Sebben* group.

The decisions below will so enormously disrupt the continuation of this important federal program and produce such completely unjustified liabilities for the insurance industry and the coal industry that they must be reversed. In both *Sebben* and *Broyles*, the circuits have committed error in need of expeditious correction.

ARGUMENT

I.
CONGRESS NEITHER REQUIRED NOR INTENDED TO REQUIRE THE LABOR DEPARTMENT TO APPLY THE SSA RULE

This case turns on the validity of the Department of Labor's regulation. If in requiring ten years of employment and permitting rebuttal in 20 C.F.R. § 727.203, the Secretary of Labor acted reasonably and in accord with the Act, the inquiry in these cases is fully answered. *See Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To sustain the rule, the agency must articulate its reasons for acting as it did. If these reasons are consistent with the Act and in accord with its purposes and if the result is not arbitrary, the rule is valid. *See NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987). Where ambiguity deprives the statutory language of undeniable meaning, this Court typically defers to the agency's interpretation, so long as the interpretation is permissible and does not lead to an arbitrary and capricious result. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Here, both courts below began and ended their analyses with the term "criteria" in section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), finding in it an unambiguous intent on the part of Congress to require Labor to apply the SSA rule. The Department of Labor has consistently interpreted "criteria," in its statutory context, to have a more limited meaning. Although the plain meaning of the term is large and loose, there are indications in the statute and legislative history that it had a fairly specific meaning for congressional drafters, which was properly ascertained by the Secretary of Labor.

All related sections of the Act should be interpreted as a part of an harmonious whole. *See Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 614-17 (1944). The Act, as a whole, gives the Secretary of Labor broad regulatory authority to define the elements of entitlement to benefits. 30 U.S.C. §§ 902(f)(1),

932(c), (h), 936(a). Section 902(f) addresses only those standards that relate to the definition of "total disability," *and within that limited context* the SSA rule permits an inference of "total disability" if the specified medical criteria are met, *i.e.*, positive x-ray, autopsy, or biopsy evidence demonstrating occupational pneumoconiosis or ventilatory test results at a specified level. 20 C.F.R. § 410.490(b). Whether an x-ray, autopsy or biopsy actually shows pneumoconiosis is not related to the issue of total disability. It is a mixed question of causation that requires the expert interpretation of medical tests. The Secretary is independently authorized to regulate concerning causation in 30 U.S.C. § 932(h) and to regulate concerning medical tests in 30 U.S.C. §§ 902(f)(1)(D) and 923(b). Whether this separate regulatory authority is overridden by section 902(f)(2) is ambiguous.

The term "criteria" itself is also used at two other places in section 902(f). Section 902(f)(1)(C) employs similar language to that used in section 902(f)(2): "regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act." 30 U.S.C. § 902(f)(1)(C). Typically, SSA disability "criteria" consist of listings of medical test results giving rise to an implication of total disability. *See* 20 C.F.R. Part 404, subpart P, app. 1 (1987). Also, 30 U.S.C. § 902(f)(1)(D) uses the term "criteria" to refer to "medical tests."

It is also significant that the plain language of section 410.490 is inconsistent with several provisions of the Act. Section 401(a) of the Act states that the purpose of the Act is to provide benefits for total disability or death due to pneumoconiosis. 30 U.S.C. § 901(a). Section 410.490 provides benefits far beyond that premise. Section 413(b) of the Act requires the consideration of all relevant medical evidence in claim litigation. 30 U.S.C. § 923(b). Section 410.490 renders such evidence irrelevant. Section 402(f)(1)(A) of the Act directs the Secretary of Labor to define "total disability" to permit an award only when "pneumoconiosis" prevents the miner from working. 30 U.S.C.

§ 902(f)(1)(A). Section 410.490 makes pneumoconiosis irrelevant to the miner's eligibility in many cases.

These references demonstrate in this exceptionally complex regulatory environment that the mandate of section 902(f)(2) is less than crystal clear. For this reason, and perhaps more importantly because of the exceptional controversy that characterized the debate over the interim presumption, consultation with external authorities, including the legislative and regulatory history of the matter, is compelled.

If Congress meant in section 902(f)(2) that the Secretary of Labor was to repromulgate the SSA regulation or adopt all of its provisions as a starting point, it chose very curious language to convey that message. What is more likely is that the Secretary of Labor was given a mandate to regulate in light of a broadly defined set of congressional expectations, and was aware that the regulations would be informally reviewed by the most interested members of Congress before publication.[12]

As an academic exercise in interpretation, the legislative history and circumstances surrounding publication of the Labor rule present many difficulties. Enlightenment and clarity are elusive. The Solicitor General and the parties will surely survey the many legislative references and extract meaning from them. All that seems certain is that the Secretary of Labor was to write a separate rule and that the Secretary was compelled to include within that rule provisions allowing rebuttal. H.R. Rep. No. 864, 95th Cong., 2d Sess. 13, 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309; 124 Cong. Rec. 2333, 3426, 3431 (1978). It was also understood that Labor was authorized to depart from the SSA usages to some significant degree. *Id.* Whether Labor's departure, particularly with respect to the ten-year x-ray invocation standard,[13] overstepped the Act or the bounds of reason is not

12. That this procedure was followed is well documented. *See* Solomons, *supra* note 5, at 896-97 & n.138; Letter from Representatives Perkins, Dent and Simon to Robert B. Dorsey, *supra* p.8.

13. On the matter of rebuttability, all sources of authority point to the conclusion that Labor was required to permit rebuttal of presumed facts. Although *Broyles* holds to the contrary, its holding is devoid of rationale, and there is none.

an answerable question within the language of the Act or the legislative history.

In this setting, judicial deference is required if Labor is able to explain its decision. Labor asserts that the word "criteria" in section 902(f)(2) means only medical criteria as distinct from "evidentiary standards." Additionally, miners with fewer than ten years of exposure do not; as a medical matter, contract disabling black lung disease and it is unreasonable to so presume. Perhaps the ten-year standard was employed to screen in the claimants most likely to be deserving and to impose a higher standard of proof on the others. Perhaps Congress left to the Secretary the discretion to compromise the demands of those few members of Congress with a "pay everybody" philosophy with the more moderate views of other members. Certainly, the Secretary's duty to factor in the rights of claim defendants also played a role.

In the aggregate, these reasons support the Secretary's exercise of discretion and validity of the rule. The deference equation requires no more, and here a traditional inquiry sustains the rule. *See American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 514 (1981).

The insurance industry's contribution to this debate arises from our long-standing perception that Congress and the Department of Labor harbored no intent to lure the industry into writing insurance coverage for an uninsurable risk. Total disability or death due to black lung disease is an insurable risk. The unemployment, general disability, retirement or death of coal miners, within the guise of a workers' compensation program, is not. The history of the insurance industry's involvement demonstrates special concern for insurability and strongly supports the Government's understanding that in designing section 727.203, the agency was required to preserve some measure of fairness for the private parties involved.

Mine owners are required to obtain adequate insurance coverage, 30 U.S.C. § 933, but the insurance industry is not required to sell it. In 1973, when the insurance industry was approached by

the Department of Labor and asked to provide coverage for federal liabilities, many in the industry felt that the risk they were invited to underwrite was either unacceptable or that coverage could not be affordably provided.[14] Given repeated assurances by the Department and Congress during the period from 1973 to the present day that the black lung claims process would, notwithstanding a uniquely generous entitlement scheme, preserve both fairness and predictability in claims adjudications, the insurance industry provided coverage at affordable rates.

Following liberalizations of entitlement rules in the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, and largely because of section 727.203, it became clear that earlier funding assumptions were no longer viable and would produce catastrophic unfunded and unanticipated losses for the industry and mine owners. In response, the insurance industry, the Labor Department, mine owners, representatives of workers and claimants, and Congress worked together to revise the Black Lung Program and its funding mechanisms to restore equilibrium.[15] House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. 16, 30 (Comm. Print 1981); *see also* H.R. Rep. No. 1410, 96th Cong., 2d Sess. 2-3 (1980) ("[T]he 1977 Amendments were unfair in imposing ... this

14. *Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 479-81 (1976).

15. This cooperative effort produced the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635. But even this substantial effort proved insufficient to ensure adequate funding for the program. In 1985 and again in 1987, Congress found it necessary to enact additional fiscal relief for the Black Lung Disability Trust Fund by raising and then extending the producers tax on coal that provides revenue for the payment of claims by the Fund. 26 U.S.C. §§ 4121, 9501; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (d), 100 Stat. 312, 313 (1986); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503 (1987). The Fund pays benefits in those cases in which no mine operator or insurer can be found individually liable. 30 U.S.C. § 934. The Fund is currently more than $3 billion in debt to the U.S. Treasury, having borrowed this amount to make up the difference between coal tax revenues and benefit payment obligations.

retroactive liability. . . . [T]he combined effect of the 1977 law requiring the automatic review of old (federal) claims, under new liberalized eligibility criteria, and of directing that those approved be paid by coal operators—either directly or through the Trust Fund—has produced a harsh result on operators (and their commercial insurers) who had no reason to anticipate that they would be held directly liable.").

The partnership between Congress, many federal agencies and the commercial liability insurance industry is pervasive. This industry is called upon frequently to assist Congress in the implementation of national policies by providing private parties the insurance coverage they need to be in compliance with federal laws.[16] In order for this partnership to be maintained, there must be an acceptable level of predictability and stability in the risks Congress creates. The partnership cannot survive if the industry is considered merely an adjunct to the Federal Treasury whenever Congress decides to be more generous, but does not want to pay the cost of its largess. Congress is well aware of this fact. It is unimaginable that Congress would, in the black lung program, ask the insurance industry to fund a compensation scheme based on the SSA presumption. It is equally improbable that Congress would do so without clearly expressing such intent.

When Congress liberalized the Act in 1978, most of the claims here in question were already insured under preexisting insurance policies. Those policies provided coverage only for total disability or death due to black lung disease and they cannot be rewritten. There is no proof that the 1978 amendments would rewrite these policies to require payment for unexpected and unknown risks wholly divorced from the stated purpose of the Black Lung Act. *See* 30 U.S.C. § 901(a) ("It is, therefore, the purpose of this title to provide benefits, in cooperation with the states, to coal

16. Just a few examples are the Longshore Act, 33 U.S.C. § 932; the Price-Anderson Act, 42 U.S.C. § 2210 (nuclear plant accidents); 42 U.S.C. §§ 5154, 5172 (nuclear disaster relief); 7 U.S.C. § 1503 (crop insurance); 33 U.S.C. § 1321(d), (p) (maritime disasters); 30 U.S.C. § 1257 (surface coal mining operations); 41 U.S.C. § 351 (government contractors); 46 C.F.R. § 540.20 (1987) (cruise ships); 14 C.F.R. Part 205 (1987) (air carriers).

miners who are totally disabled due to pneumoconiosis, and to the surviving dependents of miners whose death was due to such disease. . . .")

In sum, there are many sound reasons why the Secretary of Labor constructed section 727.203 as he did, not the least of which is that the benefit-funding mechanisms available and the rights of claim defendants deserved protection.

II.

THE SSA RULE WOULD DEPRIVE CLAIM DEFENDANTS OF RIGHTS UNDER THE ADMINISTRATIVE PROCEDURE ACT AND OF DUE PROCESS OF LAW

The Black Lung Benefits Act provides that the regulations of the Secretary of Labor "shall be issued in conformity with" 5 U.S.C. § 553. 30 U.S.C. § 936(a). Only the Secretary of Labor is authorized to promulgate regulations governing the consideration or disposition of claims adjudicated by the Department of Labor. *Id.; see id.* §§ 902(f)(1), 932(h). Section 410.490 Labor was neither published by the Secretary of Labor nor was it ever placed in the public domain for participation and comment as a rule affecting the rights of private parties. No argument can be made that any interim presumption is merely a statement of agency policy or that it fits any of the exceptions to 5 U.S.C. § 553.

Neither court below had authority to promulgate section 410.490 for Labor Department claims. The procedures set forth in 5 U.S.C. § 553 are there to protect members of the public from arbitrary rulemaking practices and to ensure that rules adopted by an agency reflect a proper and careful deliberation of competing views. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978); *FCC* v. *Schreiber*, 381 U.S. 279, 290-92 (1965). The courts may not simply step in to accomplish what the agency is prohibited from doing. *See Heckler* v. *Lopez*, 463 U.S. 1328, 1333-34 (1983);

Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77, 97 (1981).

Yet, this is precisely what the Fourth Circuit and the Eighth Circuit have done. It is not valid rulemaking and should not be sustained by this Court.[17]

Economic regulatory legislation will rarely succumb to challenge under the Due Process Clause. This Court has afforded Congress considerable leeway in regulating our national economic life. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). But if, in fact, 30 U.S.C. § 902(f)(2) requires application of the SSA regulation to the private liability of mine owners and their insurers, the minimal rationality required by the Due Process Clause is hard to find. The right to a fair hearing compelled by the Due Process Clause is similarly difficult to discern.

Section 410.490 is, from everything that is apparent, designed to require the payment of black lung benefits to coal miners and their families whether or not the miner has black lung disease or any disability from that disease. *See* Comptroller Gen. of the United States, *Report to the Congress: Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability* 8 (1980) (reporting that "in 88.5% of the [SSA] cases, medical evidence was not adequate to establish disability or death from black lung"). Section 410.490 erects a mandatory inference that the miner is totally disabled or died due to black lung disease on the basis of proof that is barely connected to either ultimate fact, if it is connected at all. *See supra* pp. 5-6.

The mine owner or its insurer is afforded a right to a hearing, but at that hearing cannot prevail by proving the falsity of presumed facts. The plain language of section 410.490 so provides, and the courts have been assiduous in acknowledging the exceptionally limited rebuttal possibilities provided. 20 C.F.R.

17. Were this Court to agree that section 727.203 is unduly restrictive and remand the matter to the Labor Department for rulemaking, a curious phenomenon would ensue. In a rulemaking proceeding, the Department will not be able to make a credible record supporting its adoption of section 410.490. The simple truth is that proof of invocation of section 410.490 cannot support the inference of ultimate fact it mandates. A subsequent challenge to section 410.490 would prove the rule to be arbitrary and capricious.

§ 410.490(c); *Broyles*, 824 F.2d at 329; *Haywood* v. *Secretary of HHS*, 699 F.2d 277, 283 (6th Cir. 1983) (both noting that section 410.490 may be rebutted only by proof that the miner is working or able to work). Section 410.490 provides no method of rebuttal at all if the miner is deceased. Thus, the survivor of a deceased miner who had perfectly normal ventilatory test results (*see supra* p. 6) is accorded a mandatory inference that death was due to pneumoconiosis and automatic entitlement to benefits under section 410.490. Again, the plain language of section 410.490 so provides. 20 C.F.R. § 410.490(c).

There is no rationality here. Application of section 410.490 would be a taking of the property of mine owners and insurers without due process of law.[18] It would be an outright sham and should not be tolerated under the Constitution. "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan* v. *Zimmerman Brick Co.*, 455 U.S. 422, 433 (1982); *see also Brock* v. *Roadway Express, Inc.*, 107 S. Ct. 1740, 1749 (1987). Section 410.490 clearly abridges these rights.

III.
THE REOPENING OF CLOSED CASES IS BARRED BY THE LONGSHORE ACT AND BY THE RULE OF RES JUDICATA

Longshore Act procedures govern the adjudication of Department of Labor black lung claims. 33 U.S.C. §§ 919, 921, *incorporated by reference into* 30 U.S.C. § 932(a); *Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977). Longshore Act procedures are exclusive, and the time limits fixed by the provisions of the Longshore Act for the pursuit of both administrative and judicial remedies

18. For insurers, section 410.490 would have the additional impact of retroactively rewriting the insurance contracts entered into with mine owners. These contracts provided no coverage for non-occupational conditions or disabilities. This feature of section 410.490 casts further doubt on the constitutional validity of the SSA rule if applied in Part C cases. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 16-17.

are jurisdictional. 33 U.S.C. § 921(a), (c). *Crowell* v. *Benson*, 285 U.S. 22, 49-53 (1932); *Louisville & N. R.R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167 (7th Cir. 1983); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 244 (1977).

The Longshore Act requires reversal of the Eighth Circuit's decision in *Sebben*. Where Congress establishes a comprehensive procedure for the adjudication of a particular class of cases, "those procedures are to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965); *cf. United States* v. *Fausto*, 108 S. Ct. 668, 675 (1988) (Congress may withdraw the right to judicial review of administrative action). Longshore Act procedures are comprehensive and exclusive. Section 21(e) of the Longshore Act provides that proceedings for the consideration of a denied claim "shall not be instituted otherwise than as provided in" the Longshore Act. 33 U.S.C. 921(e).

The *Sebben* plaintiffs[19] seek to bypass this prohibition. There is no showing that pursuit of the statutory remedies provided would have been futile, and indeed the circuit court decisions now before this Court demonstrate that the pursuit of statutory remedies would not have been futile. No argument can be made that this dispute over interim presumptions in any way involves the constitutional rights of black lung claimants. No claim can be made that the identity of the correct eligibility standard is beyond the jurisdictional purview of the Benefits Review Board or certainly the circuit courts. The Longshore Act unambiguously provides that there is only one way to adjudicate black lung claims, and that avenue prohibits alternative access to the district

19. Many within the putative *Sebben* class, including the class representatives, failed to exhaust their administrative remedies. This failure generally precludes the exercise of mandamus jurisdiction under 28 U.S.C. § 1361 by the district courts in a collateral action. *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984).

courts.[20] Were that not the case, the rule of res judicata is still properly applied in this administrative setting.

This Court has observed that the application of res judicata in civil litigation is not a matter of discretion for the federal courts. "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*.'" *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401-02 (1981) (citation omitted). In an administrative setting the rule of res judicata should be applied where the agency acts in a judicial capacity and the parties have had a fair chance to litigate. *University of Tenn.* v. *Elliott*, 106 S. Ct. 3220, 3226 (1986); *see also* Restatement (Second) of Judgments § 83, at 269 (1982). Where the rights of private parties are litigated in a proceeding governed by the Administrative Procedure Act, 5 U.S.C. § 554, *incorporated by reference into* 33 U.S.C. § 919(d), application of res judicata is particularly appropriate.

Black lung claim adjudications have all of the essential attributes of a civil trial for damages. It is difficult to discern a reason why res judicata should not apply. From the insurance industry's perspective, res judicata and finality are key elements of a fair hearing. Without these features, predictability and thus insurability become elusive. The insurance industry, including state insurance funds, cannot be expected to participate in the funding or financial management of open-ended federal welfare or entitlement programs, and there is no indication that Congress intended it to do so in the Part C portion of the black lung program. When Congress reopened previously denied claims in the 1977 amendments to the Act, it also transferred all liability for claims predicated upon coal mine employment terminating before January 1, 1970, to the Black Lung Disability Trust Fund, thus mitigating the inherent unfairness of once waiving res judicata. *Compare* 30 U.S.C. § 932(c) *with* 83 Stat. 796. When the 1978 funding formulation proved unfair, Congress again corrected funding

20. This also precludes the Eighth Circuit's reliance on 28 U.S.C. § 1361 as a jurisdictional predicate for action.

inequities. 30 U.S.C. §§ 902(i), 932(j).[21] The Eighth Circuit has no capability of funding its decision, and it does not share Congress's power to waive finality whenever the court perceives that equities so require. Res judicata applies to protect the rights of all parties, and its application is essential here.

The Eighth Circuit's reliance on *Bowen* v. *City of New York*, 106 S. Ct. 2202 (1986), is not justified. The result in *Bowen* draws rationale from specific provisions of the Social Security Act permitting a waiver of time limitations and from the exceptionally unfair actions of SSA in deciding cases under a secret rule. Neither feature of *Bowen* is even arguably present in this case. The Longshore Act permits no waiver of time limitations and there was nothing hidden in Labor's application of its regulation.[22] *Bowen* speaks not at all to the application of res judicata in the instant setting.

21. These corrections, of course, only shift liability to the coal industry as a whole, which must fund the added obligations of the Trust Fund.

22. If anything was clandestine, it was SSA's development of section 410.490. If any precedent can be drawn from *Bowen* for application in this case, it is that the private arrangement between SSA and congressional staff that generated section 410.490 invalidates any application of that rule to the detriment of private parties.

CONCLUSION

For these reasons, the decision of the Fourth Circuit and the decision of the Eighth Circuit must be reversed.

Respectfully submitted,

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